Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Petition of American Electric Power Corporation,	)	
Duke Energy Corporation, Southern Company	)	WC Dkt. No. 09-154
Services, Inc., and Xcel Energy Services Inc., for	)	
Declaratory Ruling	)	

COMMENTS OF TW TELECOM

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tw telecom inc. ("TWTC"), through its undersigned counsel, hereby submits these comments in response to the petition for declaratory ruling[1] filed by a coalition of utility pole owners in the above-referenced proceeding.[2] As explained below, the FCC should reject the utilities' proposal, which would effectively apply the telecommunications carrier pole attachment formula to all pole attachments. Instead, the FCC should focus its efforts on adopting a single pole attachment formula applicable to all attachments, including attachments used to provide voice over IP ("VoIP") service, that yields efficient prices at or near the existing cable rate. Doing so will level the playing field in broadband deployment and establish the preconditions for efficient investment.

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[1] *See* Petition of American Electric Power Service Corporation, Duke Energy Corporation, Southern Company Services, Inc., and Xcel Energy Services Inc., for a Declaratory Ruling, WC Dkt. No. 09-154 (filed Aug. 17, 2009) ("*Petition*").

[2] *See* Pleading Cycle Established for Comments on Petition for Declaratory Ruling of American Electric Power Service Corporation *et al*., Regarding the Rate for Cable System Pole Attachments Used to Provide Voice over Internet Protocol Service, Public Notice, WC Dkt. No. 09-154, DA-09-1879 (rel. Aug. 25, 2009).

I. THE COMMISSION SHOULD REJECT THE PETITION AND FOCUS INSTEAD ON ADOPTING A FORMULA THAT YIELDS RATES AT OR NEAR THE CABLE RATE FOR ALL ATTACHMENTS IN THE PENDING RULEMAKING PROCEEDING.

As TWTC has argued for years, the FCC's formulas for utility pole attachment rates are fundamentally flawed because they cause telecommunications carriers to pay attachment fees that are two to three times higher than the rates paid by cable companies. As TWTC has also argued, the most appropriate way to fix this problem is for the FCC to apply the same rate formula to all attachments, including attachments used by cable companies to provide VoIP services ("VoIP attachments"), so that all attachers pay fees equal to or close to the rates paid by cable companies today. Doing so will to ensure a level playing field between cable companies and competitive telecommunications carriers and will promote broadband deployment.

While the petitioners agree that the differential yielded by the existing formulas skews market outcomes and harms broadband deployment, their prescription for this problem is self-serving and would result in bad policy. The petitioners propose that all VoIP attachments be subject to the current telecommunications carrier formula. Since virtually all cable attachments are used to provide VoIP, the petitioners are effectively proposing that the FCC apply the telecommunications carrier formula to all attachments. As TWTC has explained, application of the telecommunications carrier formula to all attachments would result in an arbitrary and entirely unnecessary wealth transfer from telecommunications carriers and cable companies to pole owners.[3] The Commission should instead ensure that all attachers pay rates at or near the

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[3] *See generally* Letter from Thomas Jones, Counsel, Time Warner Telecom, to Marlene H. Dortch, Secretary, FCC, Attach.: *White Paper On Pole Attachment Rates Applicable To Competitive Providers Of Broadband Telecommunications Services*, RM-11293, RM-11303 (filed Jan. 16, 2007) ("*White Paper*"); Comments of Time Warner Telecom Inc., *et al.*, WC Dkt. No. 07-245, RM-11293, RM 11303 (filed Mar. 7, 2008) ("*TWTC Pole Attachment Comments*").

rates yielded by the existing cable rate formula since those rates are fully compensatory. Indeed, the wisdom of such an approach is underscored by those states that, having exercised jurisdiction over pole attachment rates, today set unified rates at or close to the cable rate.[4]

Accordingly, the Commission should reject the *Petition*, and should instead focus its resources on reforming the existing pole attachment regime to ensure that all attachers pay rates at or near existing cable rates. The FCC could accomplish this objective in at least two ways. *First*, the FCC could set the rate for attachments that carry cable service and VoIP at or near the current cable rate pursuant to its authority to set rates for attachments used to provide cable services as well as other services that have not been classified as telecommunications services (such as cable modem service or VoIP) pursuant to Section 224(b)(1).[5] The FCC could do this without first reaching a decision as to whether VoIP service is a telecommunications service or an information service.[6] The FCC could then set the telecommunications rate at the new rate for VoIP attachments (i.e., the cable rate) pursuant to its obligation to ensure that pole attachment rates for telecommunications carriers are "nondiscriminatory" under Section 224(e)(1).[7] The

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[4] *See TWTC Pole Attachment Comments* at 10 ("The states have also concluded that a single rate *based on the cable rate formula* appropriately allocates the benefit of attachments provided to telecommunications carriers and cable systems.") (emphasis in original).

[5] *See Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 336-342 (2002) ("*Gulf Power*") (affirming the FCC's authority to set rates pursuant to Section 224(b)(1) for attachments used to provide cable service and cable modem service).

[6] *See id.* at 338 (rejecting arguments that the FCC must classify cable modem service before exercising its authority to set rates for pole attachments used to provide cable service and cable modem service pursuant to Section 224(b)(1)).

[7] As TWTC explained in detail in its White Paper, Section 224 grants the FCC clear authority to eliminate discrimination in the current pole attachment regime, either by relying on the "nondiscrimination" mandate of Section 224(e) or by exercising its discretion to adjust current rate formulas to reduce or eliminate unreasonable differences in rates. *See White Paper* at 17-18.

petitioners themselves recognize that the FCC has the power to equalize rate levels pursuant to the nondiscrimination clause of Section 224(e).[8]

Second, the FCC could simply adjust the inputs to the telecommunications carrier formula so that it yields rates equal to or close to the rates currently yielded by the cable formula.[9] This approach would allow the FCC to ensure that approximately the same rate applies to all attachments. Moreover, if this were the case, the classification of VoIP as a telecommunications service or as an information service would not materially affect the rates applicable to VoIP attachments.

Furthermore, the Commission should adopt these changes in its pending rulemaking proceeding; it should not adopt new pole attachment fee rules in a declaratory ruling. To begin with, the record in the pending rulemaking proceeding fully supports all of the necessary reform measures (including those that pertain to reform of the make-ready process) for pole attachments. In contrast, the instant proceeding addresses only a subset of those issues that pertain to the appropriate rate for VoIP attachments.

Furthermore, setting pole attachment rates through a rulemaking would eliminate the possibility that new rates would apply retroactively. As TWTC has explained with respect to the

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[8] *Petition* at 2 ("[T]he application of the Cable Rate to attachments used to provide VoIP gives cable companies an unfair advantage over non-cable, competitive telecommunications carriers who provide similar voice and broadband services, yet who are statutorily subject to the Telecom Rate….contrary to the non-discrimination requirement of section 224(e)"). While petitioners argue that the nondiscrimination clause of Section 224(e) may only be satisfied by raising the cable rate to the telecommunications rate (*see Petition* at 17), TWTC explained that this is not the case: "the non-discrimination requirement in section 224(e)(1) is an independent mandate that is not tied to compliance with the cost allocation guidelines in Section 224(e)(2) and (3). The logical implication is that the rates set in accordance with Section 224(e)(2) and (3) are not always 'nondiscriminatory.' Where the cost allocation guidelines yield discriminatory rates, the nondiscriminatory mandate must trump Section 224(e)(2) and (3)." *White Paper* at 14.

[9] *See id.* at 17-20.

retroactive application of access charges to VoIP, the FCC has a strong interest in avoiding retroactive rate-making because of the litigation and confusion that retroactivity creates.[10] The same problems would arise in the pole attachment context if cable providers were forced to retroactively pay a higher rate for attachments that carry VoIP service.[11] If this were the case, pole owners would have an incentive to audit all cable attachers' service records to determine when and on what poles attachers began to offer VoIP service. Moreover, entities that have overlashed fiber on cable attachments or leased fiber that is supported by cable attachments would be forced into long and protracted disputes with the cable company and/or the utility to determine whether any back-payments are owed.

If the FCC acts to adjust its pole attachment rates in response to this petition, it may not be able to avoid retroactive application of its rate change. Whether agency action in an adjudicatory proceeding[12] applies retroactively is determined by application of a complex balancing test.[13] While the agency may make a pronouncement in an adjudicatory order that the order will not have retroactive effect, that determination is unlikely to receive deference on

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[10] *See Ex Parte* Letter of Thomas Jones, Counsel, TWTC *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 07-256, 08-8, at 12-14 (filed Jan. 8, 2009).

[11] Of course, to the extent that the new VoIP attachment rate is set at the current cable rate, retroactivity would be a moot issue.

[12] A declaratory ruling that resolves an open dispute (such as the ruling sought by the Petitioners) is treated as an adjudication under the Administrative Procedure Act. *See* 5 U.S.C. § 554(e).

[13] As the FCC explained in its *VoIP Calling Card Order*, adjudicatory decisions will not be applied retroactively "when applying the decision to past conduct or to prior events would work a manifest injustice." *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, ¶ 41 (2006) ("*VoIP Calling Card Order*"). In determining whether that is the case, the D.C. Circuit will apply a five-factor test which is "grounded in notions of equity and fairness." *Id*. ¶ 42.

appeal.[14] Nor would such an FCC pronouncement likely bar later collection actions by pole owners for back payments. The court in question (or the FCC if the billing dispute was brought as a pole attachment complaint) would likely apply the balancing test to the factors at issue in that case to determine whether retroactive application is appropriate.[15]

The FCC can avoid these problems by acting to unify pole attachment rates through a rulemaking proceeding. The Supreme Court has held that retroactive application of a rule established in a rulemaking proceeding is not permitted unless Congress has expressly authorized such application.[16] In his oft-cited concurrence in *Bowen*, Justice Scalia explained that the Administrative Procedure Act requires that legislative rules (rules established in a rulemaking) be given prospective effect only.[17] Accordingly, new pole attachment fee rules adopted in the rulemaking proceeding would not have retroactive effect.

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[14] *See Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007) (vacating the *VoIP Calling Card Order* with respect its bar on retroactive application of access charges and noting that, "[i]n reviewing agency decisions on retroactivity, it appears that we have generally shown little or no deference to agencies' rejection of claims that retroactivity produced manifest injustice, but have been quite deferential to decisions regarding the retroactive effect of agency action where retroactivity would not work a manifest injustice.") (internal cites omitted).

[15] *See id.* at 537 ("After all, the Commission's *opinion* on retroactivity, standing alone, is not necessarily the final word. Disputes over collection of tariffed charges often proceed before state agencies (when the charges are wholly intrastate) or in federal district court, and these disputes can only sometimes come before the Commission under 47 U.S.C. §§ 207 and 208 because the Commission does not entertain actions for unpaid tariffed charges.") (emphasis is original).

[16] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("*Bowen*"), *affirming*, *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750 (D.C. Cir. 1987). *See also MPAA v. Oman*, 969 F.2d 1154, 1157 (D.C. Cir. 1992) ("The holding of *Bowen* is that agencies do not have the authority to promulgate retroactive rules unless Congress has expressly said they do.")

[17] *See Bowen*, 488 U.S. at 216-20 (Scalia, J., concurring).

II. THE PETITION ITSELF DEMONSTRATES THE URGENT NEED FOR POLE ATTACHMENT RATE REFORM.

The *Petition* itself demonstrates that the Commission must act quickly to rein in the utilities' practice of exploiting the current differential in pole attachment rates to try to increase fees paid by attachers. For example, there can be no question that the FCC has not yet determined whether the telecommunication carrier rate should apply to VoIP attachments. The FCC has not addressed this matter in its post-1996 pole attachment rulemaking orders or in any pole attachment adjudicatory decision. In addition, the FCC has not classified VoIP service as a telecommunications service.

Nevertheless, the petitioners argue that the telecommunications carrier rate *already applies* to VoIP attachments, and they assert that it is unreasonable for "cable companies to claim that the Telecom Rate does not apply to cable attachments used to provide VoIP."[18] The utilities provide no basis for their legal conclusion[19] while excoriating the cable companies for failing to comply with the utilities' unilateral demand for higher fees.[20] The petitioners repeatedly argue that the FCC need only "clarify" what the utilities have already determined is the law.[21] The utilities blame the victim and argue that the cable companies' unreasonable failure to pay the telecommunications rate for VoIP attachments resulted in "billing disputes between cable

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[18] *See Petition* at 2.

[19] The petitioners merely argue that they are entitled to the telecommunications rate *now* because VoIP and traditional phone services are similar. *See id.* But this does not change the fact that the FCC has not ruled on the classification of VoIP.

[20] Indeed, the very title of Section F of the *Petition* demonstrates the utilities' contempt for the legal status quo: "Cable companies cause disputes by claiming to electric utility pole owners that VoIP is not a telecommunications service subject to the Telecom Rate." *Id.* at 12.

[21] *See id.* at ii, 4, 12, 14, 16.

companies and pole owners [that] use time and resources that could be better used to deploy broadband technologies to help achieve important policy objectives."[22]

But it is the utilities that are acting unreasonably by forcing attachers to defend themselves against utility claims that have no basis in law. For example, Bright House ("BHN") was forced to bring a pole attachment complaint against TECO because TECO was attempting to charge BHN the telecommunications carrier rate on over 160,000 attachments based on BHN's provision of a VoIP service over those attachments.[23] The Commission can diminish utilities' incentive to engage in this form of costly self-help by reforming pole attachment rates today so that all attachments are subject to the same formula. As explained, that formula should yield rates at or near the current cable rate.

III. CONCLUSION

For the foregoing reasons, the Commission should deny the instant *Petition*.

Respectfully submitted,

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[22] *Id.* at 2.

[23] *See Bright House Networks, LLC v. Tampa Elec. Co.*, Pole Attachment Complaint, File No. EB-06-MD-003, ¶ 19 (filed Feb. 21, 2006).